BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMY A. SNEATH	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,042,822**
	)	
ADVANTAGE PRN, LLC.	)	
Uninsured Respondent	)	

ORDER

Claimant requests review of the February 5, 2009 preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The respondent was a business that would provide health care workers for medical facilities that needed temporary workers. Claimant, a certified nurse aide, was sent to the Medicalodge nursing home in Kinsley, Kansas. Claimant was injured in an automobile accident that occurred while she was taking her lunch break.

The Administrative Law Judge (ALJ) found that claimant's accidental injury did not arise out of and in the course of employment as she was off the respondent's premises and on her lunch break when the accident occurred. The ALJ further noted that it was not clear from the evidence whether claimant was respondent's employee or an independent contractor. Consequently, the ALJ denied the claimant's request for benefits.

Claimant requests review of whether the ALJ erred in finding that her injury did not arise out of and in the course of employment. Claimant argues that travel is an intrinsic part of her job and therefore the accidental injury was compensable. Claimant next argues that she was respondent's employee as she was under the direction and control of respondent.

Respondent argues the ALJ's Order Denying Medical Treatment should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Lorraine Law testified that Advantage PRN, LLC (Advantage) is owned by her husband. Advantage was a nurse staffing agency. It would provide nurses, medication aides and CNAs to facilities that were shorthanded. Advantage would pay its employees and the facility would pay Advantage.

In 2007, Advantage had employees and a payroll that exceeded $20,000 as well as workers compensation insurance. In late January and early February 2008, Advantage changed its status from an employer to a contractor and no longer carried workers compensation insurance. Advantage notified its employees by letter that the company had changed to a contractor and therefore the former employees would be independent contractors. Ms. Law testified that most of the employees quit but a few accepted the independent contractor arrangement. When Advantage made the change it had its former employees sign a document which stated that they understood and agreed to the change from employee to independent contractor. Claimant testified she had never been told by Ms. Law that she was an independent contractor. And Ms. Law testified that Advantage never received such a signed document from claimant.

Advantage retained 5 employees and had a payroll that exceeded $20,000 for the 8 months it was in operation in 2008. Advantage was closed on August 18, 2008. Ms. Law testified the company does not have any assets and it would not be able to pay if any benefits were ordered against it nor would it be able to pay the $82,000 in medical bills claimant has incurred.

Advantage's Great Bend office was operated by Tammy Hoschartz. She had the authority to hire people. Claimant testified that Ms. Hoschartz told her that she was to be treated as an employee and if necessary, Ms. Hoschart would drive her to the job site as claimant did not have a driver's license. But Ms. Hoschartz tried to schedule the claimant with other workers so that they could commute together. Claimant denied that she was ever told that no money would be withheld from her paycheck nor was she told she would be an independent contractor. In 2008 claimant had only worked three days before the accident occurred on August 10, 2008.

Claimant was required to fill out a time sheet that indicated the location, time work would start, the total hours worked, the mileage and then have the nurse in charge of the facility where she worked sign the sheet. Every Sunday evening the time sheets would be turned in to respondent and claimant would be paid the following Tuesday. Claimant reported to the charge nurse at the facility who then would tell her what to do. The charge nurse would also tell her when she could take breaks although there were occasions that the workload prevented breaks.

Claimant and Francis Riegel were assigned to work for two days at the Medicalodge nursing home in Kinsley, Kansas. Ms. Riegel drove and the claimant rode with her. Their

shift started at 6 a.m. Claimant did not get paid for the time it took her to travel from her home in Great Bend, Kansas, to the nursing home.

On the day of the accident claimant and Ms. Riegel were told that they could take a 30-minute lunch break. Ms. Riegel mentioned she was going downtown to a convenience store to get something to eat and claimant decided to ride along with her. Claimant agreed that she was not paid for the 30-minute lunch break. But they were not required to clock out and Ms. Riegel did leave her cell phone number in case the facility needed them. On the trip Ms. Riegel ran a stop sign and another car hit the passenger side of Ms. Riegel's car. Claimant testified:

> Q. (By Mr. Seiwert) Those things they said -- well, was it your understanding you needed to be on call for the facility?
>
> A. Yeah. If we leave anywhere, even it we go outside to our car we have to tell the charge nurse where we're going and they say, okay, as long as were we're back by 11:30. That way they know where we're going and we've left the building so in case of an emergency we can be contacted on our cell phones.
>
> Q. Okay. So what happened when you went to go get some lunch there on August 10th of 2008?
>
> A. Apparently we were coming back from getting -- I -- I can't remember a whole lot, but I know that we had from hear -- from somebody else telling us that we had full juices in the car or what-not in the car, but we were on our way back to the facility.
>
> Q. What happened then?
>
> A. The lady -- in the car I was in, she had either ran the stop sign or stopped and -- and just went and pulled ahead of somebody else that was coming and we were T-boned on my side.[1]

Claimant was hospitalized for 11 days and part of those days were in intensive care. Ms. Sneath testified that she suffered a shattered pelvis, collapsed lung, four broken ribs and had to have an emergency splenectomy. The next day claimant's reconstruction of her pelvis was completed. Claimant is only able to walk a little bit and uses a wheelchair. She is currently in physical therapy.

Claimant filed a lawsuit against the driver of the car she was riding in and settled that claim for $25,000.

---

[1] P.H. Trans. at 16-17.

Initially, respondent argues that claimant was an independent contractor and not respondent's employee. This Board Member disagrees. It is not disputed that claimant was an employee at least until the respondent attempted to change its status from an employer to a contractor. Despite respondent's attempt to change its relationship with its employees, the claimant's uncontradicted testimony was that Ms. Hoschartz hired her to be an employee and she was never apprised of any change in that relationship. The claimant has met her burden of proof to establish that she was respondent's employee on August 10, 2008.

Respondent next argues that claimant should be estopped from alleging that she is an employee when she settled a personal injury claim against the driver of the vehicle. Respondent's argument fails because there is no indication in this record that claimant took an inconsistent position when she obtained a settlement from the driver of the vehicle she was riding in when the accident occurred. Nor has respondent established that it was prejudiced as it is entitled to a credit pursuant to K.S.A. 44-504(b).

Respondent next argues that claimant's accidental injuries did not arise out of and in the course of employment. Respondent argues that because claimant was injured while taking a lunch break away from work the accidental injury is not compensable.

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In

[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

Thompson, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[3]

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[6]

In *Blair,*[7] the Court held that when a business trip is an integral part of the claimant's employment the "entire undertaking is to be considered from a unitary standpoint rather than divisible." *See also*, *2 Larson's Workers' Compensation Law* § 25.01 which states:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

In this case travel to different medical facilities or nursing homes was an integral part of claimant's employment with respondent. As long as the trip or task is an integral or

---

[3] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[4] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[7] *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

necessary part of the employment an injury during any portion of the trip or task is compensable. In the recent *Halford*[8] case the Court of Appeals restated and adopted the rationale of *Blair* in the following fashion:

> As emphasized by our court in *Mendoza* and *Brobst,* this exception extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an injury during any aspect thereof is compensable. See *Blair v. Shaw,* 171 Kan. 524, 528, 233 P.2d 731 (1951) (entire trip by mechanics from annual certification test was integral to employment, causing deaths during trip to be compensable). So long as the employee's trip or task is an integral or necessary part of the employment, this exception applies to assure compensability for an injury suffered *during any portion of such trip or task.* See *Kindel,* 258 Kan. at 277.

Applying the principles announced in the above-referenced cases and treatise, this Board Member concludes that travel was intrinsic to claimant's employment with respondent and *Blair* requires the entire undertaking to be viewed as indivisible. Travel to obtain a meal is not such a departure to be considered a substantial deviation from work. There is nothing to suggest claimant had departed on a personal errand, consequently, claimant has met her burden of proof that she suffered accidental injury arising out of and in the course of her employment during an activity which was reasonably incidental to her work-related travel.

The ALJ's Order Denying Medical Treatment is reversed and the case is remanded for further proceedings, if necessary, to address claimant's requests for payment of medical bills and medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

WHEREFORE, it is the finding of this Board Member that the Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller dated February 5, 2009,

---

[8] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206 *rev. denied* ____ Kan. ____ (2008).

[9] K.S.A. 44-534a.

[10] K.S.A. 2008 Supp. 44-555c(k).

is reversed and the case is remanded for further proceedings, if necessary, to address the claimant's requests for payment of medical bills and medical treatment.

IT IS SO ORDERED.

Dated this 28th day of May 2009.

_____
HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge